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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

FREDDIE LEE TAYLOR, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden,
California State Prison,
San Quentin,
Petitioner,

v.

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA,
Respondent,

FREDDIE LEE TAYLOR,
Real Party in Interest.

No. 97-70567

D.C. No. C 92-1627-MHP

OPINION

PETITION FOR WRIT OF MANDAMUS TO
THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF CALIFORNIA

Argued and Submitted
November 25, 1997--San Francisco, California

Filed January 26, 1998

Before: Jerome Farris, Diarmuid F. O'Scannlain, and Michael Daly Hawkins, Circuit Judges

Opinion by Judge O'Scannlain

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OPINION

O'SCANNLAIN, Circuit Judge:

We are asked to decide whether a district court may allow a habeas corpus petitioner to amend his petition to delete unexhausted claims and hold the amended petition in abeyance subject to further amendment reincorporating the deleted claims once they are litigated in state court.

I

The real party in interest in this case, Freddie Lee Taylor, is a California prisoner sentenced to death for first degree murder. On July 10, 1995, Taylor filed a petition for a writ of habeas corpus in the District Court for the Northern District of California raising some forty-six separate claims, many of which were unexhausted. The State moved to dismiss the petition. The district court, Judge Marilyn Hall Patel presiding,[1] initially ruled that

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1. Subsequent to the issuance of the order that is the subject of

it would stay rather than dismiss the petition pending exhaustion in California state court. The State moved for reconsideration in light of several intervening Ninth Circuit cases holding that district courts may not stay "mixed" habeas petitions (petitions containing both exhausted and unexhausted claims), *see Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir.), *cert. denied*, 117 S.Ct. 794 (1997), *Calderon v. United States District Court (Gordon)*, 107 F.3d 756 (9th Cir.), *cert. denied*, 118 S.Ct. 265 (1997), and *Reutter v. Crandel*, 109 F.3d 575 (9th Cir.), *cert. denied*, 118 S.Ct. 142 (1997).

On April 1, 1997, the district court issued a lengthy written order and held that it would allow Taylor to amend his original petition to delete the unexhausted claims and would hold in abeyance the amended petition while Taylor exhausted the deleted claims in state court. The district court also invited Taylor to file a second amended petition incorporating the newly exhausted claims after litigating them in the California courts.

In accordance with the district court's order, Taylor deleted the unexhausted claims from his original petition and filed his "First Amended Petition for Writ of Habeas Corpus" on April 30, 1997.

The State now petitions this court, pursuant to 28 U.S.C. § 1651(a)[2/] and Federal Rule of Appellate Procedure 21, for a writ of mandamus or, in the alternative, a writ of prohibition, directing the district

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the government's petition, Judge Patel was elevated to the post of Chief Judge of the Northern District.

2. The All Writs Act, 28 U.S.C. § 1651(a), provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

court to vacate the portion of its order holding in abeyance Taylor's amended petition pending his exhaustion of previously unexhausted claims in state court. The State argues that the district court's order circumvents the spirit, if not the letter, of the Supreme Court's decision in *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), and this court's recent holdings in *Greenawalt*, 105 F.3d 1268, *Gordon*, 107 F.3d 756, and *Reutter*, 109 F.3d 575.

The legitimacy of the district court's self-titled "procedural device of withdrawal and abeyance" presents an important and difficult question of first impression in this circuit.

II

[1] The Supreme Court has declared that "[t]he supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power'...." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953); *see also Kerr v. United States District Court*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976) ("The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.").[3] In an effort to implement that command,

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3. The writ of prohibition is the "fraternal twin" of its more familiar sibling, the writ of mandamus. *See* Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1668 (4th ed.1996). The two are evaluated under an identical standard. *See Guam v. District Court of Guam*, 641 F.2d 816, 820 (9th Cir. 1981) ("The writs of mandamus and prohibition are drastic remedies, to be used only in extraordinary situations.").

this court has adopted a five-part standard to govern the issuance of writs of mandamus:

> The guidelines are: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he desires; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests persistent disregard for the federal rules; and (5) whether the district court's order raises new and important problems or issues of law of first impression.

In re Cement Antitrust Litigation, 688 F.2d 1297, 1301 (9th Cir.1982), *aff'd, Arizona v. United States District Court*, 459 U.S. 1191, 103 S.Ct. 1173, 75 L.Ed.2d 425 (1983). "[R]arely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is applicable. The considerations are cumulative and proper disposition will often require a balancing of conflicting indicators." *Bauman v. United States District Court (Union Oil)*, 557 F.2d 650, 655 (9th Cir.1977).[4] However, although all five factors need not be satisfied in order for mandamus to issue, "it is clear that the third factor, the existence of clear error as a matter of law, is dispositive." *Executive Software North America, Inc. v. United States District Court (Page)*, 24 F.3d 1545, 1551 (9th Cir.1994).

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4. For instance, the final two factors, by definition, generally do not coexist: "[T]he fourth contemplates a case presenting an oft-repeated error, and the fifth a case presenting a novel question. Where one of the two is present, the absence of the other is of little or no significance." *United States v. Harper*, 729 F.2d 1216, 1222 (9th Cir.1984). In this case, we are concerned with the fifth factor, and not the fourth.

[2] The State contends (and Taylor does not seriously dispute) that the first two factors of the *Cement* standard are satisfied because the State effectively has no alternative procedural mechanism, such as direct appeal, by which timely to vindicate its interests, in light of the fact that the violation alleged in its petition--the circumvention of the "total exhaustion" requirement--will be complete at the moment the district court exercises jurisdiction. Similarly, the State contends (and Taylor does not seriously dispute) that the fifth factor is present, because the district court's order represents what appears to be the first attempt in this circuit to implement the "withdrawal-and- abeyance" procedure. Consequently, the parties appear to agree on one thing: the propriety of mandamus in this case turns predominantly, if not exclusively, upon the satisfaction of the third *Cement* factor.

[3] In determining whether the third factor is satisfied, we recognize that a lesser showing is required in so-called "supervisory mandamus" cases, "where the petition raises an important question of law of first impression, the answer to which would have a substantial impact on the administration of the district courts." *Cement*, 688 F.2d at 1307. In such cases--one of which the instant case certainly seems to be--mandamus may issue upon a showing of ordinary (as opposed to clear) error:

> [I]n supervisory mandamus cases involving questions of law of major importance to the administration of the district courts ... we see no legitimate reason for refraining from exercising our supervisory authority where we can determine that an error has been made but cannot, for whatever reason, characterize the error as "clearly" erroneous.
> . . . Moreover, [where a] petition represents a question of law of first impression, the resolution of which

> would have a substantial effect on the orderly and efficient administration of the courts, we might issue the writ even were we simply to conclude that the district court was in error.

Id.

[4] With regard to the all-important third factor, both parties rest their mandamus arguments on their respective positions as to the merits of the district court's action, and argue that the court's order was--or was not, as the case may be--erroneous as a matter of law. Consequently, the mandamus issue in this case is inextricably tied to the substantive question whether the district court's "withdrawal-and-abeyance" procedure was a valid exercise of that court's discretion. If we conclude that the district court's order was proper, then mandamus is, by definition, an inappropriate remedy. If, however, we conclude that the district court's order was contrary to settled law, then under the lower standard applicable in supervisory mandamus situations, mandamus will lie. We therefore turn, without further delay, to the merits of the State's petition.

III

A

[5] The "exhaustion" doctrine has long been one of the pillars of federal habeas corpus jurisprudence. *See, e.g., United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 17-19, 46 S.Ct. 1, 2-3, 70 L.Ed. 138 (1925); *Ex Parte Royall*, 117 U.S. 241, 251, 6 S.Ct. 734, 740, 29 L.Ed. 868 (1886). Under the present-day codification of that doctrine, habeas relief is not available "unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . ." 28 U.S.C. § 2254(b)(1)(A).

In *Rose v. Lundy*, 455 U.S. 509 (1982), the Supreme Court addressed for the first time the proper method for disposing of habeas petitions containing both exhausted and unexhausted claims. The Court adopted a rule of "total exhaustion" and directed that "a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Id.* at 510.

Unfortunately, not all lower courts took the Court's ruling in *Rose* in stride. Subsequent to *Rose*, in *Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir.1988), this court proposed an "alternative" procedure for dealing with mixed petitions (a procedure that was, quite frankly, in stark conflict with the central teaching of *Rose*). The *Neuschafer* court suggested in a footnote that "[w]hen a petitioner has not exhausted his state remedies before filing a federal habeas petition, a district court may hold the [mixed] federal petition in abeyance, issue a stay of execution, and allow the petitioner an opportunity to exhaust his state remedies." *Id.* at 1472 n. 1.

On the heels of *Neuschafer* (and in the face of *Rose*), the Ninth Circuit's Death Penalty Task Force promulgated model local rules for the district courts. One of these rules, adopted by the Northern District of California, was Local Rule 296, which specifically codified a *Neuschafer*-like "stay-and-abeyance" procedure for mixed petitions:

> If the petition indicates that there are unexhausted claims for which a state court remedy is still available, petitioner will be granted a sixty (60) day stay of execution in which to seek a further stay from the state court in order to litigate the unexhausted claims in state court. During

> proceedings in state court, the proceedings on the petition will be stayed. After state court proceedings have been completed, petitioner may amend the petition with respect to the newly exhausted claims.

L.R. 296-8(e).

In a trio of recent cases, this court has, at long last, made it manifestly clear that both the *Neuschafer* dictum and Local Rule 296-8(e) are inconsistent with the mandate of *Rose*, and that the "stay-and-abeyance" procedure for mixed petitions that they begot will no longer be considered a valid exercise of judicial power. In *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir.), *cert. denied*, 117 S.Ct. 1794 (1997), the court rejected an argument that the district court had abused its discretion in dismissing, rather than staying, a mixed petition, and explicitly refused to follow the *Neuschafer* court's dictum:

> First, [petitioner] argues that the district court abused its discretion by dismissing his preliminary petition instead of staying it while he exhausted his claims in state court. [Petitioner] concedes, however, that his preliminary petition contained an unexhausted claim. . . . The Supreme Court repeatedly has instructed the district courts to dismiss "mixed" petitions containing any unexhausted claims.

Id. at 1273. The *Greenawalt* court's conclusion was echoed in *Calderon v. United States District Court (Gordon)*, 107 F.3d 756 (9th Cir.), *cert. denied*, 118 S.Ct. 265 (1997). Noting that "[t]he district court [had] reached its erroneous conclusion by relying on our opinion in *Neuschafer v. Whitley*," the court stated:

> We first hold that the district court erroneously stated . . . that dismissal of mixed habeas petitions, as required by *Rose v. Lundy*, "is not the rule in the Ninth Circuit." Because [petitioner's] amended habeas corpus petition undisputedly contained unexhausted state claims, dismissal of the federal petition was required.

Id. at 760 (internal citation omitted). Finally, in *Reutter v. Crandel*, 109 F.3d 575 (9th Cir.), *cert. denied*, 118 S.Ct. 142 (1997), the court ruled that "[t]he unexhausted first federal claim . . . prevents consideration of [the prisoner's] petition. The petition is mixed and so requires dismissal. [The prisoner] may strike the unexhausted claim and resubmit his petition to the district court." *Id.* at 578 (internal citation omitted).[5]

In light of *Greenawalt*, *Gordon*, and *Reutter*, the district court in its April 1, 1997 order candidly conceded that "the rule in the Ninth Circuit is now that a mixed petition must be dismissed or the unexhausted claims stricken."

B

The district court discovered a relatively simple way around the *Greenawalt-Gordon-Reutter* proscription against holding mixed petitions in abeyance pending exhaustion in state court. In fact, all told, the procedure the district court followed involved only three essential

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5. Other circuits similarly disallow the holding in abeyance of mixed habeas petitions. *See, e.g., Christy v. Horn*, 115 F.3d 201 (3d Cir.1997); *Victor v. Hopkins*, 90 F.3d 276 (8th Cir.1996), *cert. denied*, 117 S.Ct. 1091 (1997).

steps: *first*, it allowed Taylor to amend his mixed petition to delete the unexhausted claims; *second*, it stayed and held in abeyance the amended, fully exhausted petition pending Taylor's exhaustion of the previously unexhausted claims in California state court; and *third*, it suggested that it would allow Taylor to amend his petition for a second time after litigating his claims in state court in order to fold the newly exhausted claims back into his original habeas petition.

The State insists that, viewed holistically, the district court's "withdrawal-and-abeyance" procedure is merely a "subterfuge"--an end run around the exhaustion and abuse-of-the-writ principles, the very principles that recent Supreme Court and Ninth Circuit cases have attempted to fortify, *see, e.g., McCleskey v. Zant*, 499 U.S. 467 (1991); *Rose*, 455 U.S. 509; *Greenawalt*, 105 F.3d 1268. The district court, the State complains, essentially "allowed Taylor to follow the identical procedure that he would have followed under the local rule, except that the stayed petition is an exhausted one rather than a mixed one. It defeats the purposes of the exhaustion and abuse of the writ doctrines just as effectively as if the petition was mixed, however." Petition for Writ of Mandate, or in the Alternative, for Writ of Prohibition at 22 (hereinafter "Petition"). The State argues that "[b]y employing this technique, the district court circumvent[ed] the rulings of *Rose*, *Greenawalt*, and *Gordon* and effectively allow[ed] itself to be used 'merely as a jurisdictional parking lot.' " Petition at 32 (quoting *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir.1995), *cert. denied*, 116 S.Ct. 715 (1996)). Petition at 32.

The State raises some rather serious allegations. We must therefore carefully scrutinize each step of the district court's order--amendment, abeyance, and

re-amendment--to determine its consistency with established law.

1

[6] The State does not question the district court's authority to permit Taylor to amend his original petition by deleting the unexhausted claims. Nor could it. The Supreme Court in *Rose* specifically provided habeas petitioners with the option of amending their applications to delete unexhausted claims rather than suffering a dismissal, *see Rose*, 455 U.S. at 520 ("[The petitioner] can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims."), and the rule of *Rose* allowing amendment is well-supported by Ninth Circuit precedent, *see, e.g., Reutter*, 109 F.3d at 578 ("[Petitioner] may strike the unexhausted claim and resubmit his petition to the district court."). Moreover, as the district court concluded, Federal Rule of Civil Procedure 15(a) also required that it give Taylor an opportunity to amend his petition.[6] Because the State had not yet filed its "responsive pleading" at the time Taylor sought leave to amend, Taylor had the right, in accordance with Rule 15(a), "to amend [his] pleading once as a matter of course. . . ." Fed.R.Civ.P. 15(a).

2

The State focuses its critique upon the second step of the district court's analysis. Although Taylor is entitled

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6. Rule 15(a) applies to habeas corpus actions with the same force that it applies to garden-variety civil cases. *See* 28 U.S.C. § 2242 (providing that habeas petitions "may be amended or supplemented as provided in the rules of procedure applicable to civil actions"); *see also Withrow v. Williams*, 507 U.S. 680, 696 n. 7 (1993).

to delete the unexhausted claims from his petition rather than suffer a dismissal, he is *not* entitled, the State contends, to have his amended petition held in abeyance pending exhaustion; rather, the State insists, it is at liberty to litigate the exhausted claims "forthwith." Petition at 23.

In making its anti-abeyance argument, the State takes great pains to distinguish Taylor's case from *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir.1993). In *Fetterly*, several months after a habeas petitioner had filed a fully exhausted petition in federal district court, his newly-appointed attorney discovered a new claim, one that had not previously been asserted in state proceedings. *See id.* at 1297. In light of his discovery, he requested that the district court stay the habeas proceedings while he exhausted the newly identified claim in state court. *See id.* at 1297-98. The district court, however, refused to grant the stay. *See id.* at 1298. On appeal, this court concluded that the district court's refusal constituted an abuse of discretion. Under the unique circumstances of that case, the court held, the district court was not only permitted, but required, to stay proceedings on the exhausted petition pending exhaustion in state court. *See id.* at 1301.

The State contends--and indeed the district court concluded--that *Fetterly* is not squarely applicable to Taylor's petition because, unlike the petitioner in *Fetterly*, "Taylor was aware of his unexhausted claims before he filed his federal petition." Petition at 28 (emphasis in original). We agree. However, the fact that the district court was not *required*, under *Fetterly*, to hold Taylor's exhausted petition in abeyance does not necessarily imply that the district court was without *discretion* to do so. Indeed, there is language in *Greenawalt* suggesting that district courts do indeed have the authority to take such a step. In distinguishing *Fetterly*, the *Greenawalt* court pointed to the fact that whereas it dealt with a mixed

petition (which, under *Rose*, it was required to dismiss), the *Fetterly* court dealt with a fully exhausted petition (over which the district court legitimately had jurisdiction). Simply put, *Fetterly* was correctly decided, the *Greenawalt* court concluded, because "[a] district court has discretion to stay a petition which it may validly consider on the merits." *Greenawalt*, 105 F.3d at 1274.[7] Invoking that very passage from the *Greenawalt* decision, the district court held that once the unexhausted claims "are removed from the petition here, this court could consider it on the merits; therefore the court may stay it."[8]

The State suggests that the language in *Greenawalt* upon which Taylor relies should be strictly limited to the unique situation presented in *Fetterly*, namely, in which a *new* lawyer discovers *new*, previously unexhausted claims. At least on its face, however, the disputed language

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7. Other circuits endorse similar rules and permit the staying of fully exhausted petitions. *See, e.g.*, *Burris v. Farley*, 51 F.3d 655, 658-59 (7th Cir.1995) (suggesting that it would be permissible for a habeas petitioner to "fil[e] a petition raising all exhausted issues and ask [ ] the court for a stay until the remaining issues have been exhausted"); *Thompson v. Wainwright*, 714 F.2d 1495, 1498 (11th Cir.1983) ("[A] district court having before it a habeas petition containing only exhausted claims may continue the case at the petitioner's request pending his presenting to the state courts other claims that are not included in the petition and have not been exhausted.").

8. The district court found that a number of factors counseled in favor of its exercising its discretion to grant the stay: (1) in filing a mixed petition in the first instance, Taylor had relied in good faith on Local Rule 296-8(e), which was still valid prior to the recent decisions in *Greenawalt*, *Gordon*, and *Reutter*; (2) if the district court denied the stay, then Taylor would have to abandon temporarily the unexhausted claims and litigate them in a subsequent petition, resulting in piecemeal litigation; and (3) Taylor did not appear to have sought the stay "to delay, to vex, or to harass."

betrays no such limitation. Although the *Greenawalt* court did indeed cite *Fetterly* as an instance of legitimate petition-staying, the context in which the court spoke indicates that it intended, by invoking *Fetterly*, to draw a bright line between the staying of fully exhausted petitions, which it deemed appropriate, and of mixed petitions, which it deemed inappropriate:

> In *Fetterly*, we held that a district court should have stayed, rather than dismissed, a valid habeas corpus petition containing only exhausted claims to give the petitioner time to exhaust several newly-discovered claims in state court. *A district court has discretion to stay a petition which it may validly consider on the merits. But Greenawalt argues that the district court should have stayed a petition which, under* Rose, *it was obliged to dismiss immediately. Fetterly does not support that proposition.*

Greenawalt, 105 F.3d at 1274 (internal citations omitted) (emphasis added).[9]

[7] When pressed at oral argument, the State was unable to muster any specific support for its assertion that

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9. Ironically, in its original motion for reconsideration, filed before the specter of amendment or deletion had surfaced (and, consequently, at a time when Taylor's petition was still mixed and the State's litigation strategy was understandably somewhat different), the State appeared to cite the *Greenawalt* passage for the very proposition that it now seeks to deny: exhausted petitions may be stayed, mixed petitions may not--*period*. Not surprisingly, in the wake of the district court's decision to permit amendment--rendering Taylor's petition exhausted rather than mixed--the State abandoned its original interpretation of the *Greenawalt* language in favor of the more limited construction it now submits. Unfortunately for the State, we believe that its original interpretation--the interpretation now urged by Taylor--is the more natural one.

district courts do not have discretion to stay fully exhausted petitions and that habeas petitioners who amend their applications to delete unexhausted claims must proceed immediately upon the exhausted ones. In response to the question whether it had "any authority that says a district court does not have the discretion to stay a petition containing only exhausted claims," the State frankly conceded that it did "not have specific authority that the district court has no such authority to do that."[10] In light of *Greenawalt*--which on its face certainly appears to confer power upon district courts to stay fully exhausted petitions--and the State's inability to cite to the panel any contrary authority, we cannot say that the district court erred in holding Taylor's amended, exhausted habeas petition in abeyance.[11]

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10. In its opening remarks during oral argument, the State suggested that *Rose* itself required that habeas petitioners who choose to amend their petitions to excise unexhausted claims must proceed immediately on the exhausted claims that remained: "[Under *Rose*,] the petitioner may . . . resubmit the petition containing exhausted claims. If he does that, he must proceed on the exhausted claims." As the cited colloquy indicates, however, the State eventually backed away from that position. And rightly so. Although the Supreme Court referred on three separate occasions in *Rose* to the dismissal and amendment options available to habeas petitioners who submit mixed petitions, the Court did not, as the State originally suggested, intimate that those petitioners who opted for amendment were required to proceed posthaste on their remaining claims. *See Rose*, 455 U.S. at 510; *id.* at 520-21.

The State also urged at one point during its argument that "*Greenawalt* says you cannot get a stay." *Greenawalt* did, as we have seen, hold that district courts may not stay a mixed petition; however, as we have also seen, contrary to the State's position, the *Greenawalt* court concluded that district courts do possess the authority to stay fully exhausted petitions.

11. We emphasize that our decision in no way grants district courts carte blanche to stay even fully exhausted habeas petitions. We can, of course, imagine situations in which a district court might

[8] Finally, the State challenges that portion of the district court's order specifically directing that "[u]pon completion of state proceedings, petitioner shall file a second amended petition" folding into the abeyant petition the newly exhausted claims. The State contends that any "subsequent amendment of a formerly exhausted petition to add newly exhausted claims . . . could be barred as an abuse of the writ." Petition at 24. On that score, the State is clearly correct. In *Rose*, the Supreme Court explicitly warned habeas petitioners that, if they opted to amend rather than to take a dismissal, they "risk[ed] forfeiting consideration of [their] unexhausted claims in federal court" under abuse-of-the-writ principles. *Rose*, 455 U.S. at 520; *see also* Rules Governing Section 2254 Cases, Rule 9(b); *McCleskey*, 499 U.S. at 493-96. Indeed, Taylor candidly conceded at oral argument that his anticipated attempt to re-amend his petition to add previously unexhausted claims will be subject to an abuse-of-the-writ challenge.

[9] The State's challenge to the "re-amendment" portion of the district court's order, however, is premature. Although the district court invited Taylor to file a second amended petition after exhausting his previously unexhausted claims in the California system, it did not indicate how it would ultimately rule on such motion. In fact, in its oral ruling, the district court specifically declined to express an opinion on the

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be found to have abused the very discretion that *Greenawalt* appears to afford. It could not, for instance, stay habeas proceedings indefinitely pending exhaustion in state court, nor could it hold in abeyance the application of a petitioner who merely sought to stall the habeas corpus process. This, however, is not such a case; there was no abuse of discretion here. *See supra* note 8.

re-amendment issue, believing that to do so "would be advisory at best." The State itself acknowledged at oral argument that "we are not at that point yet because [Taylor] ha[s] not come back with the [second] amended petition." We agree with the district court that any ruling as to the legitimacy of a step not yet taken would be tantamount to an advisory opinion. We therefore do not reach the issue.

IV

[10] There is, we must concede, much force to the State's position. We understand the State's frustration. If the district court allows Taylor--as it has suggested it might--further to amend his abeyant petition to add previously unexhausted claims, the circle will indeed be complete. Taylor will have successfully achieved precisely what *Greenawalt*, *Gordon*, and *Reutter* forbid: the staying and holding in abeyance of a habeas petition that, at least when it came through the courthouse door, contained both exhausted and unexhausted claims. Unfortunately, however, on mandamus review, frustration is not enough. Rather, the mandamus petitioner must isolate and distinctly articulate the precise legal error that the offending official committed. The State has not discharged that burden in this case. This case is not about whether or not the rule articulated in *Greenawalt* allowing district courts to hold fully exhausted petitions in abeyance is a good rule, or whether that rule might on occasion spawn mischief. Rather, our jurisdiction is limited to determining whether or not the district court followed the *Greenawalt* rule *as articulated*. Consequently, notwithstanding any substantive concerns regarding the "withdrawal-and-abeyance" procedure that we might have, we are simply unable--even under the lower standard applicable in supervisory mandamus cases--to issue the writ to the district court at this time. The petition for a writ of mandamus is **DENIED**.

FILED
APRIL 1, 1997
RICHARD WEIKING
CLERK
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

FREDDIE LEE TAYLOR,
Petitioner,

v.

ARTHUR CALDERON, in his
capacity as Warden of California
State Prison at San Quentin,
Respondent.

No. C 92-1627 MHP

ORDER RE: MOTION FOR
RECONSIDERATION

DEATH PENALTY CASE

INTRODUCTION

Petitioner Freddie Lee Taylor is a California prisoner sentenced to death. Presently before the court is respondent's Motion for Reconsideration of this court's October 20, 1995, oral rulings regarding respondent's

motion to compel exhaustion and petitioner's countermotion for discovery. The court must decide the proper disposition of the mixed petition in light of the Ninth Circuit's recent decisions in *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir. 1997), and *Calderon v. U.S.D.C. (Gordon)*, ___ F.3d ___, 1197 W.L. 71765 (9th Cir., Feb. 21, 1997). The court also must decide whether any discovery is permissible at this stage of the proceedings under *Calderon v. U.S.D.C. (Nicolaus)*, 98 F.3d 1102 (9th Cir. 1996).

A hearing was held on March 28, 1997, at 10:30 a.m. Upon consideration of the briefs and arguments of the parties, the court enters the following memorandum and order.

BACKGROUND

The California Supreme Court affirmed petitioner's first degree murder conviction and death sentence in December 1990. *People v. Taylor*, 52 Cal.3d 719 (1990). It denied his petition for habeas corpus in September 1990. Petitioner then sought appointment of counsel and a stay of execution from this court. The court appointed counsel in 1992, and on June 30, 1995, stayed petitioner's execution pending final disposition of the case. Petitioner filed his Petition for Writ of Habeas Corpus raising 20 claims on July 10, 1995.

Respondent filed a motion on August 14, 1995, to dismiss the petition or, in the alternative, to compel exhaustion. Petitioner then filed a counter-motion for discovery. The court held a hearing on these motions on October 20, 1995. At the hearing, the court announced its oral rulings. The court stated that it would: (1) issue a tentative ruling identifying the unexhausted claims, and give petitioner (but not respondent) an opportunity to

respond to that ruling; (2) DENY the motion to dismiss the petition, and instead hold the petition in abeyance while petitioner exhausts his unexhausted claims under Local Rule 296-8(e); and (3) GRANT the requested discovery in part. To date, no written ruling has issued.

Since the hearing, three major developments have reshaped the law under which the court must consider the exhaustion and discovery issues. First, in October 1996, the Ninth Circuit held in *Calderon v. U.S.D.C. (Nicolaus)*, 98 F.3d 1102 (9th Cir. 1996), that discovery is not available in a habeas action prior to the filing of the finalized petition. The court also suggested that discovery on unexhausted claims is impermissible.

Second, on April 24, 1996, President Clinton signed into law the 1996 Antiterrorism and Effective Death Penalty Act (Pub. L. 104-132, 110 Stat. 1214) (the Act). The Act enacts a one-year statute of limitations for all federal habeas petitions filed by state prisoners. 28 U.S.C. § 2244(d). However, in December 1996, the Ninth Circuit held in *Jeffries v. Wood*, 103 F.3d 827 (1996), that the Act's amendments to Chapter 153 of Title 28 of the U.S. Code, which includes § 2244(d), do not apply to "cases filed" in the federal courts of this circuit before the Act's enactment.[1/]

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1. The Act also created a new Chapter 154 (§§ 2262-2266) to Title 28 of the United States Code. This chapter establishes procedures applicable only in capital habeas cases under 28 U.S.C. § 2254, and only when a state "opts in" by establishing that it has met the criteria in the Act. Congress expressly provided that Chapter 154 shall apply to cases pending on or after the date of the Act. In *Ashmus v. Calderon*, No. 96-1533 TEH, however, the court enjoined application of this chapter in California. (*See* order of June 14, 1996.) That order is on appeal.

Third, on January 17 and February 21, 1997, the Ninth Circuit issued its decisions in *Greenawalt* and *Gordon*. Those decisions cast doubt upon the continuing validity of the abeyance procedure of Local Rule 296-8(e).

Accordingly, on February 4, 1997, respondent filed a Motion for Reconsideration of Court's Oral Ruling and Alternative Motion for Issuance of Written Ruling on Respondent's Motion to Dismiss Petition. Respondent asks the court to: (1) reconsider its oral ruling denying respondent's original motion to dismiss the petition for lack of exhaustion, and instead to dismiss it in light of *Greenawalt* and *Gordon*; and (2) to reconsider its oral ruling granting petitioner post-petition discovery on his unexhausted claims and instead, to deny the motion under *Nicolaus*. Petitioner filed an opposition to the motion on February 21, 1997, and respondent replied on February 28, 1997. On March 21, 1997, petitioner filed a Declaration of Nanci Clarence in support of petitioner's equitable tolling request.

DISCUSSION

A. General Contentions[2/]

Respondent contends that in light of *Greenawalt* and *Gordon* this court must dismiss the pending "mixed" petition because it contains unexhausted claims. If the court permits petitioner to withdraw the unexhausted

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2. As a preliminary matter, the court notes that respondent's motion for reconsideration is procedurally improper. Respondent has not complied Local Rule 7-9, which requires leave of court to file such a motion. However, petitioner does not object to the motion on this ground. Petitioner has responded on the merits, and the motion is fully briefed and argued. Accordingly, the court will overlook the procedural lapse and consider the motion on the merits.

claims, respondent argues it has no authority to hold the fully exhausted petition in abeyance while petitioner exhausts the unexhausted claims.

Respondent further contends that, because the court must dismiss the petition, it has no authority to grant discovery under *Nicolaus*. Even if the court retains jurisdiction over part of the petition, respondent urges the court to deny discovery because all the discovery sought goes to unexhausted claims.

Petitioner first contends that *Greenawalt* is factually distinguishable from this case and does not compel the court to dismiss the pending petition. Even if *Greenawalt* is binding, petitioner argues that applying it to dismiss the petition here would be impermissibly retroactive and deny him due process.

Even if the court finds applying *Greenawalt* would not deny him due process, petitioner argues that, rather than dismissing the petition, the court must permit him to amend the petition to delete the unexhausted claims. The court may then hold the fully exhausted petition in abeyance while he exhausts the unexhausted claims under *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993).

If the court follows this procedure, petitioner asks the court to declare the statute of limitations of 28 U.S.C. § 2244(d) equitably tolled as to the unexhausted claims on two grounds: (1) this court's delay in ruling on respondent's motion to compel exhaustion; and (2) the disruption in preparation of the exhaustion petition created by the unexpected death of one of petitioner's counsel.

Finally, petitioner contends that *Nicolaus* does not compel the court to reconsider its discovery rulings

because: (1) the court has authorized *post*-petition discovery, not *pre*-petition discovery; and (2) the discovery sought goes to exhausted claims.

B. Exhaustion

(1) Identifying Unexhausted Claims

(a) Legal Framework

A federal court may not grant habeas relief until the petitioner has exhausted available state remedies with respect to each claim. 28 U.S.C. § 2254(b); *Gray v. Netherland*, 116 S.Ct 2074, 2081-82 (1996); *Picard v. Connor*, 404 U.S. 270 (1971). Exhaustion doctrine rests on principles of comity and federalism. *Rose v. Lundy*, 455 U.S. 509, 515 (1982). Exhaustion is required to: (1) protect the state court's role in the enforcement of federal law; (2) prevent disruption of state court proceedings; and (3) reduce piecemeal litigation. *Id*. at 518-20.

The exhaustion requirement is satisfied when a claim has been "fairly presented" to the highest state court and that court has had a meaningful opportunity to apply controlling legal principles to the facts underlying the claim. *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986); *Picard*, 404 U.S. at 276-77; *Anderson v. Harless*, 459 U.S. 4, 7 (1982); *Middleton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). Once a claim has been fairly presented, it is exhausted, even if the state court's decision did not expressly address it. *See Smith v. Digmon*, 434 U.S. 332, 333 (1978); *Beam v. Paskett*, 3 F.3d 1301, 1305-06 (9th Cir. 1993).

A claim has been "fairly presented" if the petitioner described in state court both the legal theories and the operative facts on which he bases the claim.

Picard, 404 U.S. at 277-78; *see Crotts v. Smith*, 73 F.3d 861, 865 (9th Cir. 1995). To fairly present the legal theory of a claim, a petitioner must alert the state court that he is asserting a *federal* constitutional claim, either by citing the constitutional provision on which he relies or otherwise advising the court of the claim's federal basis. *Duncan v. Henry*, 115 S.Ct. 887, 888 (1995); *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996).

The factual basis of a claim has been fairly presented as long as the facts alleged in federal court do not fundamentally alter the nature of the claim [*see Hillery*, 474 U.S. at 260; *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 19940], place the claim in a "significantly different and stronger evidentiary posture" than it was when the state courts considered it, or "substantially improve[] the evidentiary basis" of the claim. *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988). Generally, a petitioner may add factual materials supportive of those already in the record without fundamentally altering his claim and rendering it unexhausted. *See Hillery*, 474 U.S. at 260 (statistical analyses of facts already in record do not render claim unexhausted).

(b) Analysis

The federal habeas petition includes 20 claims, several of which have numerous subclaims. Respondent argues that 38 of these claims and subclaims are partially or completely unexhausted,[3/] and eight are exhausted.[4/]

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3. I, II, III, IV, V, VI, VII, VIII, IX.A, IX.B, IX.C, IX.D, IX.E, IX.F, IX.G, IX.H, IX.I, IX.J, IX.K, XI, XII.A, XII.B, XII.C, XII.D, XII.E, XIII, XIV, XV.A, XVI.A, XVI.B, XVI.C, XVI.D, XVI.E, XVI.F, XVI.L, XVIII, XIX and XX. The claim numbers refer to the claims as stated in the federal habeas petition.

4. X, XV.B, XVI.G, XVI.H, XVI.I, XVI.J, XV.K and XVII.

The court agrees that many of the claims are unexhausted. After reviewing the federal habeas petition, the opening brief on direct appeal and the state habeas petition, the court concludes that petitioner did not present to the California Supreme Court the substance of the following claims: I, II, III, IV, V, VI, VII, VIII, IX.B, IX.C, IX.D, IX.E, IX.F, IX.G, IX.H, IX.I, XII.A, XII.C, XII.D, XIII, XV.A, XVI.A, XVI.B, XVI.E, XVIII, XIX and XX. The court also agrees that the eight claims respondent identifies as completely exhausted have in fact been fully and fairly presented to the California Supreme Court. The remaining claims are discussed below.

(i) Partially exhausted claims

Six subclaims include both exhausted and unexhausted legal theories. In Claim IX.J, petitioner argues that trial counsel provided ineffective assistance because he did not object to the prosecution's use of the attempted rape of the victim as an aggravating factor at the penalty phase. Petitioner argued to the California Supreme Court that counsel should have objected because the attempted rape was not an appropriate aggravating factor, and the state court rejected the claim on that basis. *See Taylor*, 52 Cal.3d at 743. This legal argument is therefore exhausted.

Petitioner now argues that trial counsel should have objected to the attempted rape on the additional ground that it was not supported by sufficient evidence. Petitioner has not presented either the operative facts or the legal theory supporting this claim to the California Supreme Court. This part of the claim is thus unexhausted.

In Claim IX.K, petitioner argues that trial counsel rendered ineffective assistance under the Sixth

Amendment by failing to object to photographs of the victim while alive. *See Taylor*, 52 Cal.3d at 731-32, 747. Petitioner also argues that counsel's failure made the trial fundamentally unfair and unreliable in violation of the Fifth, Eighth and Fourteenth Amendments. Petitioner did not raise the Fifth, Eighth and Fourteenth Amendment theories in his briefing before the California Supreme Court. These legal theories are therefore unexhausted.

Claim XII.B also includes both exhausted and unexhausted arguments. Petitioner argued in his opening brief on direct appeal that the prosecutor denied him due process by failing to comply with the notice requirements of California Penal Code § 190.3. *See People v. Taylor*, Appellant's Opening Brief [hereinafter AOB] at 81 n. 55. Petitioner described for the state court the operative facts and the federal constitutional theory for his argument. This argument is thus exhausted, even though the California Supreme Court's decision did not expressly address the due process theory. *See Smith*, 434 U.S. at 333; *Beam*, 3 F.3d at 1305-06. Petitioner did not argue in state court that the prosecutor's conduct violated his Sixth Amendment right to counsel. This legal theory for claim XII.B has not been exhausted.

Petitioner presented to the California Supreme Court the equal protection basis for claim XVI.C: The California death penalty statute is unconstitutional because it does not require a finding of premeditation. *See Taylor*, 52 Cal.3d at 747. He did not argue to that court that the statute's failure to require premeditation violates due process, the Sixth Amendment and the Eighth Amendment. These legal theories are therefore unexhausted. Similarly, the due process basis for petitioner's challenge to the motive instruction (claim XVI.F) has been presented to the California Supreme

Court (*see id.*), but the Sixth and Eighth Amendment grounds have not.

In claim XVI.L, petitioner contends that the California death penalty statute is unconstitutionally vague, arbitrary and overbroad for four specific reasons. He also argues that the enumerated defects in the statute, considered cumulatively, render it unconstitutional. This court agrees with respondent that only the second enumerated defect--failure to require written jury findings--was presented to the California Supreme Court. The rest of claim XVI.L is therefore unexhausted.

(ii) Factual exhaustion

This court further concludes that five claims identified by respondent as all or partially unexhausted are in fact exhausted. With respect to two of these claims, respondent argues that new allegations render previously presented claims unexhausted. As discussed in more detail below, the new allegations do not change the substance of the claims presented to the state court.

In claim IX.A, petitioner contends that trial counsel provided ineffective assistance because he did not object to aggravating evidence that petitioner pled guilty to two 1984 burglaries. Petitioner raised this claim in both his opening brief and his state habeas corpus petition. On direct appeal, the California Supreme Court held that petitioner could not show prejudice. *See id.* at 740. Petitioner has added an allegation that the California Supreme Court improperly analyzed the prejudicial effect of the evidence. This new allegation does not change the legal theory of the claim--that trial counsel provided constitutionally defective and prejudicial representation--or fundamentally alter the factual basis for the claim. *See Vasquez*, 474 U.S. at 260; *Crotts*, 1995 WL 592798 at 3. The claim remains exhausted.

In claim XII.E, petitioner contends that he was denied due process by the prosecutor's argument that he showed no remorse for the crimes. The California Supreme Court denied the claim on the merits. *See id.* at 744-45. Petitioner now alleges that the argument was made in bad faith because the prosecutor should have known that he had shown remorse. This new allegation about the prosecutor's knowledge does not "fundamentally alter" or "substantially improve" the prosecutorial misconduct claim. *See Vasquez*, 474 U.S. at 260; *Aiken*, 841 F.2d at 883. The claim is exhausted.

(iii) Exhaustion of Federal constitutional grounds

The court also disagrees with respondent's contentions that the federal constitutional bases for the remaining three claims have not been presented to the California Supreme Court. Claim XI is exhausted because petitioner made the due-process and double-jeopardy arguments in his opening brief. *See* AOB at 148 n. 92. Claim XIV is exhausted because petitioner argued to the state court that the unitary jury violated his rights under the Sixth, Eighth and Fourteenth Amendments. *See id.* at 100 n. 66. Claim XVI.D is exhausted because petitioner made the federal constitutional due-process argument in his opening brief on direct appeal. *See id.* at 142 n. 88.

(2) Exhaustion Procedure

(a) Legal Framework

In *Rose v. Lundy*, 455 U.S. 509, the Supreme Court resolved a split among the Circuits as to the proper disposition of a "mixed" habeas petition containing both exhausted and unexhausted claims. Several circuits, including the Ninth [*see, e.g., Gonzales v. Stone*, 546 F.2d

807 (9th Cir. 1976)], had adopted a "total exhaustion" rule requiring dismissal of a mixed petition. Other circuits had permitted review of the *exhausted* claims in a mixed petition. *Rose*, 455 U.S. at 513, n. 5.

Finding that the "total exhaustion" rule "promotes comity and does not unreasonably impair the prisoner's right to relief," the Supreme Court held that a "district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Id.* at 522. In the alternative, a petitioner who submits a mixed petition has the option of amending the petition to delete the unexhausted claims. *Id.* at 520. However, a petitioner who chooses to do so and proceeds on his exhausted claims "risks dismissal of subsequent federal petitions." *Id.* at 521.

In the late 1980's, well after *Rose* was decided, the Ninth Circuit's Death Penalty Task Force formulated model local rules for the district courts. This court adopted Local Rule 296, modeled on the Ninth Circuit's rules, in 1988.

Local Rule 296-8(e) set out an abeyance procedure for mixed petitions under which the district court was to determine whether a newly filed petition contained unexhausted claims and, if it did, hold the entire petition in abeyance while the petitioner exhausted those claims in state court.[5] Local Rule 296-8(e) was an attempt to

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5. L.R. 296-8(e) states:

If the petition indicates that there are unexhausted claims for which a state court remedy is still available, petitioner will be granted a sixty (60) day stay of execution in which to seek a further stay from the state court in order to litigate the unexhausted claims in state court. During proceedings in state court, the proceedings on the

accommodate both the Supreme Court's decision in *Rose* and other Ninth Circuit precedent, namely *Neuschafer v. Whitley*, 860 F.2d 1470, 1472 n. 1 (9th Cir. 1988). In *Neuschafer*, the Ninth Circuit had addressed the question whether withholding claims from a first federal petition because they were unexhausted could constitute grounds for finding an abuse of the writ when a second petition was brought raising those claims once they had been exhausted. In dicta, the Ninth Circuit stated that a district court may hold a habeas petition in abeyance while the petitioner exhausts his unexhausted claims. *Id.* at 1472, n. 1. Since the adoption of L.R. 296-8(e), the practice in this district has been to permit filing of mixed petitions and to follow the procedure outlined above.

Recent rulings by the Ninth Circuit cast doubt on the validity of this procedure. First, in *Greenawalt v. Stewart*, 105 F.3d 1268 (filed January 17, 1997), that court held that a district court did not abuse its discretion when it declined to hold a successive petition containing a single, unexhausted claim in abeyance and instead dismissed the petition pursuant to *Rose*. *Id.* at 1275. The Ninth Circuit further stated " . . . [petitioner] contends that counsel might have persuaded the district court to stay the petition instead of dismissing it, pursuant to . . . *Neuschafer*. As we explained earlier, any such action by the district court would have violated *Rose*." *Id.* at 1276. Thus, the Ninth Circuit suggested that a district court might abuse its discretion if it held a mixed petition in abeyance rather than dismissing it.

The Ninth Circuit reiterated this position in *Calderon v. U.S.D.C. (Gordon)*, ___ F.3d ___, 1197 W.L.

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petition will be stayed. After state court proceedings have been completed, petitioner may amend the petition with respect to the newly exhausted claims.

71765 (9th Cir., Feb. 21, 1997), where it stated that a district court properly struck a mixed petition containing both exhausted and unexhausted claims. The court noted that "because Gordon's amended habeas corpus petition undisputedly contained unexhausted state claims, dismissal of the federal action was required." *Id.* at *4. The court then expressly vacated that portion of the district court's opinion that had relied on an Eastern District Local Rule identical to Northern District L.R. 296-8(e) as authority for the stay of a mixed petition.

Despite its insistence that a *mixed* petition must be dismissed, the Ninth Circuit nonetheless made it clear that the district court may hold in abeyance a first habeas petition containing only *exhausted* claims while the petitioner exhausts newly discovered, unexhausted claims in state court. *Greenawalt*, 105 F.3d at 1274, approving of *Fetterly v. Paskett*, 997 F.2d 1295. That is because "a district court has discretion to stay a petition which it may validly consider on the merits," and because the equities favoring a stay are greater in the context of a first petition. *Id.*

(b) Scope of *Greenawalt* and *Gordon*

Respondent contends that *Greenawalt* and *Gordon* compel dismissal of the pending mixed petition. Petitioner asserts that *Greenawalt*[6] is not binding under the circumstances here because it is factually distinguishable. Petitioner essentially argues that *Greenawalt*'s statement that mixed petitions must be dismissed is dicta because the petition there contained only a single unexhausted claim and no exhausted claims.

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6. Petitioner's opposition to the motion was filed on the same day that *Gordon* was decided. Therefore, petitioner's argument does not take *Gordon* into account.

The court agrees with petitioner that, on the facts presented in *Greenawalt* and *Gordon*, those courts' announcement of a dismissal rule for mixed petitions may be dicta. Ultimately, however, it is unnecessary to undertake an exhaustive analysis of *Greenawalt* and *Gordon* to decide this issue. In a recent decision the Ninth Circuit considered the district court's dismissal for failure to exhaust a petition containing four claims. *Reutter v. Crandel*, 97 D.J.D.A.R. 3811 (9th Cir., Mar. 24, 1997). The district court had found all four unexhausted. On appeal, the Ninth Circuit disagreed as to three of the claims, but agreed that the first federal claim was unexhausted. It then held: "The petition is mixed and so requires dismissal. [Citation.] Reutter may strike the unexhausted claim and resubmit his petition to the district court. [Citation.]" *Id.* at 3812.

The *Reutter* holding eliminates any doubt: the rule in the Ninth Circuit is now that a mixed petition must be dismissed or the unexhausted claims stricken. Accordingly, the court rejects petitioner's first argument.

(c) Applying the Rule of *Greenawalt* and *Gordon* Will Not Deny Petitioner Due Process

(i) Legal Framework and Contentions

Until quite recently, *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), governed the law of retroactivity

of civil judicial decisions.[7] *Chevron* sets out a three-pronged analysis, asking whether the decision in question:

> (1) establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;
>
> (2) states a rule whose retrospective application will retard more than further its operation, considering the rule's prior history and its purpose and effect;
>
> (3) is a decision whose retroactive application could produce substantial inequitable results, and for which a holding on non-retroactivity would avoid injustice or hardship.

See Reed v. Hoy, 891 F.2d 1421, 1424-25 (9th Cir. 1989); *Austin v. City of Bisbee*, 855 F.2d 1429, 1432-33 (9th Cir. 1988).

In *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), the Supreme Court set forth a new civil retroactivity rule. The Supreme Court held: "[w]hen this court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law

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7. Petitioner asserts that the law of *civil* retroactivity governs this analysis, rather than the law of retroactivity of criminal decisions [*Griffith v. Kentucky*, 479 U.S. 314 (1987)], or the rule of non-retroactivity of new constitutional rules of criminal procedure [*Teague v. Lane*, 489 U.S. 288 (1989)], because habeas corpus is in essence a civil remedy. Respondent does not dispute this contention, and the court agrees.

and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 509 U.S. at 97; *see also Mujahid v. Meyer*, 59 F.3d 931 (9th Cir. 1995).

Petitioner first contends this case is controlled by *Chevron*. Petitioner contends the *Harper* rule applies only: (1) when the new rule was actually applied in the case announcing it; and (2) when the new rule is announced by the Supreme Court. Because the *Greenawalt* court did not apply the total exhaustion rule in the case before it (because announcement of the rule in that case was dicta), and because *Greenawalt* came out of the Ninth Circuit, according to petitioner *Chevron* controls.

Petitioner then contends that applying *Greenawalt* to dismiss his case would be impermissibly retroactive under *Chevron*. First, he argues *Greenawalt* announced a "new principle of law" because it purports to overrule a Local Rule of this court, "akin" to a statute. Second, he contends application of the dismissal rule here will not further its purpose because there are only a small number of cases in a like procedural posture and thus respondent will not be prejudiced if the court declines to apply it. Third, he contends that retroactive application of *Greenawalt* will have substantial inequitable results because dismissal of the petition, and refiling post-Act, could potentially "decimate" his claim. Petitioner suggests his claims could be barred by the statute of limitations if he refiles after exhaustion. He further asserts that he relied on the Local Rule in filing a mixed petition and thus in fairness the court should decline to apply *Greenawalt* to him.

Respondent argues the court must dismiss the mixed petition under *Harper* because *Greenawalt* and

Gordon announced and applied the mixed petition dismissal rule. Further, even under *Chevron*, application of the dismissal rule would not be impermissibly retroactive for two reasons. First, the rule those cases announced was not "new" in light of *Rose*, and this court's Local Rule cannot "trump" *Rose*. Second, even if the rule is new, its application will not cause injustice because petitioner can simply refile the petition after exhaustion. He will not be deprived of a federal hearing; the hearing will merely be postponed. Thus, according to respondent, there is no denial of due process to apply the dismissal rule here.

(ii) Analysis

The court first must decide which retroactivity analysis controls--*Chevron* or *Harper*. If *Harper* controls, then the analysis is at an end, and the court must apply the dismissal rule to this case because of *Reutter*. If *Chevron* controls, however, the court must determine whether application of the dismissal rule is impermissibly retroactive.

Petitioner asserts that *Harper* is inapplicable here for two reasons: (1) because the dismissal rule was not applied in *Greenawalt*; and (2) because *Greenawalt* was not a decision of the Supreme Court. As explained above in Section B(2), however, even if *Greenawalt* and *Gordon* did not apply the mixed petition dismissal rule in the cases before them, the court in *Reutter* unquestionably did so. Thus, petitioner's first ground for declining to apply *Harper* fails.

Turning to petitioner's second argument, *Holt v. Shalala*, 35 F.3d 276, 380 (9th Cir. 1994), which petitioner cites, does not support the proposition that *Harper* applies only to decisions of the Supreme Court. There, the Ninth

Circuit held only that "[b]ecause the Supreme Court in [*Shalala v. Schaefer*, 509 U.S. 292 (1993)] did not apply the new rule it announced to the case at bar, we apply traditional *Chevron* analysis here." *Holt*, 35 F.3d at 380, n. 3. *Holt* did not hold that only decisions of the Supreme Court are subject to *Harper* analysis. Thus, *Holt* does not tell us which retroactivity analysis controls decisions other than those of the Supreme Court.

The other cases petitioner cites are no more helpful. He cites several cases where the Ninth Circuit applied *Harper* to Supreme Court decisions. But none of these cases involved an appeals court decision, they shed no light on whether *Chevron* retroactivity analysis controls such decisions. The court is aware of no Ninth Circuit cases discussing whether *Harper* applies to a decision of the Ninth Circuit.[8] Thus, the question appears to be undecided.

The court finds, however, that it need not decide this question. Even under *Chevron*, the court finds application of the dismissal rule is not impermissibly retroactive because the rule is not "new."

For a rule to be considered "new" under *Chevron*, it must create a "clear break with past precedent." *Dean v. TWA, Inc.*, 924 F.2d 805 (9th Cir. 1991) *Greenawalt*, *Gordon* and *Reutter* did not do so. Even before *Rose*, the Ninth Circuit had announced and applied a "total exhaustion" rule for mixed petitions. *E.G.*, *Gonzales v. Stone*, 546 F.2d 807 (9th Cir. 1976); *James v. Reese*, 546 F.2d 325 (9th Cir. 1976). The trend continued after *Rose*. *E.g.*, *Campbell v. Blodgett*, 927 F.2d 444, 445 (9th Cir.

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8. A single Tenth Circuit case used *Harper* to decide the retroactivity of a Third Circuit decision. *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1547-48 (10th Cir. 1996).

1991); *Roman v. Estelle*, 917 F.2d 1505 (9th Cir. 1990); *Guizar v. Estelle*, 843 F.2d 371 (9th Cir. 1988); *Kellotat v. Cupp*, 719 F.2d 1027 (9th Cir. 1983); *Szeto v. Rushen*, 709 F.2d 1340 (9th Cir. 1983); *see also Powell v. Spalding*, 679 F.2d 163, 166 (9th Cir. 1982) (affirming denial of leave to amend petition to assert unexhausted claim where amendment would have necessitated dismissal under *Rose*). That the Ninth Circuit sometimes overlooked the rule and proceeded to consider mixed petitions does not lessen the force of these cases. *E.g.*, *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981) (reviewing exhausted claims in mixed petition because district court did so and dismissal of entire petition would give petitioner the opportunity to relitigate the exhausted claims); *accord Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979).

Further, as the Ninth Circuit noted in *Greenawalt*, *Neuschafer*'s statement that a district court may hold a mixed petition in abeyance was dicta. And even if *Neuschafer* created a split of authority with the other cases noted above, it cannot be said that the Ninth Circuit's recent adherence to the total exhaustion rule clearly broke with past precedent.

Petitioner's argument with respect to Local Rule 296-8(e) fares no better. *Greenawalt* and *Gordon* did break with the procedure outlined in that rule.[9] However, local rules must be interpreted in a manner consistent with Acts of Congress [*see* 28 U.S.C. § 2071-(a); Fed. R. Civ. P. 83(a); N. Dist. L.R. 296-1; *see also* Habeas

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9. As noted above, the *Gordon* court vacated that part of the district court's decision that had relied on an identical Eastern District local rule as authority to stay a mixed petition rather than dismissing it. *See Gordon*, 1997 W.L. 71765, *5 (vacating part II.B of district court's opinion, *Gordon v. Vasquez*, 859 F.Supp. 413, 417 (E.D. Cal. 1994).

L.R. 2254-2] and thus with the case law interpreting those acts. Moreover, the local rule was merely a rule of practice, not "precedent" enshrined in binding case law.[10/]

In sum, the court finds that *Greenawalt*, *Gordon* and *Reutter* did not clearly break with past precedent to announce a "new" rule. Accordingly, it is not impermissibly retroactive to apply the dismissal rule here.

(d) The court will permit petitioner to amend the petition to withdraw the unexhausted claims and will hold the amended, fully exhausted petition in abeyance

Petitioner asserts that even if the court applies *Greenawalt* here, it must permit him to amend the petition to delete the unexhausted claims. He asserts that, once the unexhausted claims have been deleted, a valid petition will be before the court that may than be stayed under *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993). He contends that denial of a stay would be an abuse of discretion because this is his first habeas petition, he relied at all times on the local rule in filing a mixed petition, and his stay request is not a delaying tactic.

Respondent argues the court cannot "bypass" the total exhaustion rule by the procedural device of withdrawal and abeyance. Respondent suggests that

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10. Petitioner cites *United States v. Hyass*, 355 U.S. 570 (1958), for the proposition that local rules are "laws of the United States." There, the Supreme Court held that a local rule of a district court, which authorized that court to take testimony under oath of an out-of-state attorney, was a "law of the United States" within the meaning of 18 U.S.C. § 1621, the federal perjury statute. This case has nothing to do with perjury. Thus, *Hyass* does not aid in the retroactivity analysis.

amending the petition is impermissible; he points out that, while Chapter 154 is inapplicable here, under that Chapter no amendment is permitted unless petitioner makes a showing of "cause" and "innocence." 28 U.S.C. § 2266(b)(3)(B).

Respondent further argues that if the court permits withdrawal of the unexhausted claims, the court must adjudicate the exhausted claims rather than staying them. Petitioner then must risk having any subsequent petition dismissed as an abuse of the writ. He asserts that *Fetterly* is distinguishable because there the petitioner filed a fully exhausted federal petition and later discovered the existence of unexhausted claims, while here petitioner knew of the unexhausted claims when he filed the petition. If the court permits withdrawal and abeyance, he argues, petitioners will have no incentive not to file mixed petitions in the future.

(i) The court will permit petitioner to amend the petition to delete the unexhausted claims

The court agrees with petitioner that it must permit him to delete the unexhausted claims from the petition. *Rose* expressly states that a petitioner has that option. *Rose*, 455 U.S. at 520 (petitioner "can always amend the petition to delete the unexhausted claims"). Ninth Circuit habeas authority confirms it. *Reutter v. Crandel*, 97 D.J.D.A.R. at 3812 (petitioner may choose to strike unexhausted claims); *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994) (same); *Roman v. Estelle*, 917 F.2d at 1506 (holding petitioner must be given opportunity to amend mixed petition to include only the exhausted claims); *Guizar v. Estelle*, 843 F.2d at 372 (holding petitioner may resubmit petition with only exhausted claims); *see Ostrosky v. State of Alaska*, 913 F.2d 590, 593 n. 9 (9th Cir. 1990).

Moreover, Federal Rule of Civil Procedure 15, regarding amendment of complaints, applies in the habeas context. *See* 28 U.S.C. § 2242 (habeas corpus application "may be amended or supplemented as provided in the rules of procedure applicable to civil actions"); Advisory Committee Note to Rule 11 of Rules Governing Section 2254 Cases (district court has discretion to use any Civil Rule when appropriate to circumstances); *Withrow v. Williams*, 113 S.Ct. 1745, 1755-56 n. 7 (1993). F.R.C.P. 15(a) provides that "a party may amend his pleading once as a matter of course at any time before a responsive pleading is filed." The Ninth Circuit has held in another context that a motion to dismiss for lack of jurisdiction is *not* a "responsive pleading" within the meaning of that rule. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995). Respondent's motion to compel exhaustion is somewhat analogous to a motion to dismiss for lack of jurisdiction. Thus, because respondent has not yet answered the petition, it appears that under F.R.C.P. 15 the court must give petitioner an opportunity to amend to cure any defect before it dismisses the petition.

Respondent's citation to 28 U.S.C. § 2266(b)(3)(B), part of the Chapter 154 "opt-in" provisions, only underscores the point. That Congress included such strict limits on amendment in Chapter 154, but did not include such limits in Chapter 153, if anything indicates a Congressional intent to permit amendment when the prisoner is, as here, proceeding under Chapter 153.

Nothing in *Greenawalt* or *Gordon* undermines this conclusion. In *Greenawalt*, the petition contained only a single unexhausted claim, so the petitioner could not have complied with *Rose* by deleting it and the court had no option but to dismiss. In *Gordon*, neither party raised the possibility of deleting unexhausted claims. Thus, neither

case stands for the proposition that amendment is impermissible.

In light of these authorities, there is no reasonable argument that the court lacks authority to permit petitioner to withdraw the unexhausted claims. The court therefore will permit petitioner to do so.

(ii) The court will exercise its discretion to hold the fully exhausted petition in abeyance pending exhaustion of the unexhausted claims

The court turns next to the question of the proper disposition of the exhausted petition once the unexhausted claims are deleted. Petitioner cites *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993), in support of his request that the court hold his petition in abeyance once he removes the unexhausted claims. In *Fetterly*, the attorney who had represented petitioner at every stage in state court filed on his behalf a fully exhausted first federal habeas petition. Newly appointed counsel then discovered the existence of a new, unexhausted claim of sentencing error. Recognizing that amending the petition to include the unexhausted claim would subject the petition to dismissal under *Rose v. Lundy*, petitioner asked the district court to stay the federal proceedings while he exhausted the new claim in state court, and then permit him to amend the petition to include the claim after it was exhausted. The district court refused to grant a stay, finding the error purely one of state law and not cognizable on habeas. The court then denied the remaining claims.

On appeal, the Ninth Circuit held that the district court had abused its discretion in denying the stay to permit petitioner to exhaust the new claim. *Fetterly*, 997 F.3d at 1301-02. First, the court found the error

cognizable as a potential denial of due process. *Id.* at 1299-1301. Second, it found that the fact that the same attorney who had represented petitioner in state court had filed the federal petition "raised the specter" of ineffective assistance of counsel. *Id.* at 1301. Third, the court recognized the potential that any subsequent petition containing the new claim might be dismissed as an abuse of the writ. *Id.* at 1302. Finding "nothing at all in the record to suggest that the motion was brought to delay, to vex, or to harass," the court held it was an abuse of discretion to deny the stay. *Id.* The Ninth Circuit reaffirmed *Fetterly* in *Greenawalt*. 105 F.3d at 1274.

Respondent argues that *Fetterly* is distinguishable. Respondent notes that the petitioner in *Fetterly* discovered his unexhausted claim only *after* filing a fully exhausted habeas petition. In contrast, here petitioner knew the claims were exhausted but alleged them in a mixed petition. Thus, respondent argues, *Fetterly* does not compel this court to hold petitioner's exhausted petition in abeyance.

The court agrees with respondent that the circumstances in this case are sufficiently different from those in *Fetterly* that this court would not abuse its discretion if it declined to hold the exhausted petition in abeyance. This court has made no finding that the unexhausted claims are cognizable on habeas. No issue of ineffective assistance has been raised. And petitioner was aware of his unexhausted claims at the time he filed the federal petition.

However, that does not dispose of the question whether this court *may* nevertheless hold the exhausted petition in abeyance. "A district court has discretion to stay a petition which it may validly consider on the merits." *Greenawalt*, 105 F.3d at 1274. Once the

exhausted claims are removed from the petition here, this court could consider it on the merits; therefore the court may stay it. There are substantial reasons for the court to do exercise it discretion here.

First, petitioner has an excuse for not presenting his unexhausted claims to the state court earlier: his reliance on Local Rule 296-8(e). Before *Greenawalt* and *Gordon* were decided, petitioner was fully justified in believing he could file a mixed petition, obtain a ruling on the exhaustion status of the claims, and then present the unexhausted claims to the state court. Because of his reliance on the rule, he did not exhaust the claims earlier. The court may weigh petitioner's reliance interest in the balance in determining whether to hold the exhausted petition in abeyance rather than adjudicating it.

Respondent's argument that petitioner could have returned to state court before receiving this court's ruling identifying unexhausted claims is rejected. The court expressly stated that it would issue such a ruling; petitioner was diligent in attempting to obtain it. *See* letters of June 1996 and August 1996. Petitioner justifiably declined to guess which claims the court would consider unexhausted. Exhaustion questions often rest on fine distinctions and exercises of judgment. *See* cases cited at pp. 6-7, *supra*. If petitioner had guessed incorrectly, returned to state court to exhaust, and then filed an amended petition that still contained unexhausted claims, those claims could have been considered as an abuse of the writ. *See Farmer v. McDaniel*, 98 F.3d 815, 847 (9th Cir. 1995) (holding unexhausted claims in successive, mixed petition subject to dismissal as an abuse of the writ). Petitioner reasonably declined to engage in such speculation.

Second, if the court were to deny a stay, petitioner would in essence be forced to abandon the unexhausted claims now and litigate them in a successor petition. But this would only result in piecemeal litigation, a result the exhaustion and abuse of the writ doctrines are designed to avoid. There remains a possibility that the state court will grant relief on one of the unexhausted claims. Thus, this court might merely waste its time if it proceeds on the exhausted ones. Further, it appears that the exhausted and unexhausted claims are at least somewhat interrelated both factually and legally. Therefore, it would be most efficient to adjudicate them all at once. Given the potential prejudice to petitioner and waste of court resources from piecemeal litigation, this court should use reasonable means to ensure that all claims are litigated in a single proceeding.

Third, petitioner's other reasons for distinguishing *Greenawalt* and applying *Fetterly* are sound. Petitioner does not appear to be seeking a stay "to delay, to vex, or to harass." Rather, until this point he has proceeded in conformance with applicable court rules. Moreover, petitioner is asking for a stay of a *first* habeas petition, not a successor petition as in *Greenawalt*. The Ninth Circuit has expressly reaffirmed that the equities in favor of a stay are greater in the context, as here, of a first petition. *See Greenawalt*, 105 F.3d at 1274, citing *Lonchar v. Thomas*, 116 S.Ct. 1293, 1299 (1996) ("Dismissal of a first federal habeas petition is a particularly serious matter . . . ") Finally, petitioner did not file his petition, like the *Greenawalt* petitioner, on the eve of the Act's enactment in an attempt to avoid its consequences. Rather, he filed well before enactment.

Respondent contends the court should not stay the exhausted claims because doing so will only encourage petitioners to file mixed petitions in the future. This

argument overlooks that petitioner's reliance on Local Rule 296-8(e) is a major factor affecting today's decision. Given the Ninth Circuit's reaffirmance of the total exhaustion rule in *Greenawalt*, and *Gordon*'s vacation of the part of the district court's order using an identical local rule to stay a mixed petition, petitioners from here forward will have a lesser reliance interest.

The authorities respondent cites from other Circuits [*Victor v. Hopkins*, 90 F.3d 276 (8th Cir. 1996), and *Sterling v. Scott*, 57 F.3d 451 (5th Cir. 1995)], at most reaffirm the rule--as did *Gordon*--that a district court may not stay a *mixed* petition while the petitioner exhausts state remedies. They did not address the withdrawal/abeyance procedure proposed here.

In sum, the equitable factors here point toward granting petitioner the relief he seeks. The court will exercise its discretion to hold the exhausted petition in abeyance while petitioner exhausts the unexhausted claims.

C. Equitable Tolling

(1) Contentions

Petitioner contends he is unsure whether the one-year statute of limitations, 28 U.S.C. § 2244(d), applies to him under *Jeffries v. Wood*, 103 F.2d 827 (9th Cir. 1997), holding the Act's amendments to Chapter 153 of U.S.C. Tile 28 inapplicable to cases filed before enactment. Nonetheless, if the court dismisses the petition in whole or in part, he asks the court to equitably toll the statute of limitations on two grounds.

First, petitioner asks for tolling during the time the court delayed in ruling on respondent's motion to compel

exhaustion. Second, he asks the court to toll the statute for 90 days, during which he will complete and file a state habeas petition. He contends that the unexpected death from AIDS of counsel Stuart Buckley has disrupted preparation of the petition and this unusual circumstance warrants additional time for filing.

Respondent asserts, without discussion, that petitioner's tolling request is "premature." Nonetheless, he counters that tolling is unwarranted because petitioner could have returned to state court without a ruling from this court telling him which claims were exhausted. Further, he asserts petitioner will suffer no prejudice if the court denies tolling, because the remaining limitations period will be tolled by the filing of his state petition in any event. *See* 28 U.S.C. § 2244(d)(2).

(2) Analysis

Although respondent does not elaborate on his claim that petitioner's tolling request is "premature," the argument has merit. The court may not have all the facts necessary to decide petitioner's tolling claim before it until petitioner returns from state court and refiles the unexhausted claims. Furthermore, it is uncertain whether § 2244(d) ultimately will apply to petitioner. *See Jeffries*, 103 F.3d 827 (Chapter 153 amendments inapplicable to cases filed before enactment); *but see Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (holding application of amended 28 U.S.C. § 2254(d) to pending cases not impermissibly retroactive), *cert. granted*, 117 S.Ct. 726 (Jan. 10, 1997) (No. 96-6298). Accordingly, the court declines to rule on petitioner's equitable tolling request at this time. Petitioner may renew the tolling claim, if necessary, upon his return from state court.

D. Discovery

Respondent asks the court to reconsider it oral ruling granting petitioner's discovery motion. He asserts that *Calderon v. U.S.D.C. (Nicolaus)*, 98 F.3d 1102 (9th Cir. 1996), holding discovery is not available in a habeas action prior to filing the finalized petition, is dispositive. First, he asserts that since the petition is mixed and the court must dismiss it, the court has no authority to grant discovery. Second, even if the court does not dismiss, he contends *Nicolaus* disapproved of discovery going to unexhausted claims, and all of petitioner's requested discovery is related to such claims.

Petitioner argues that in this case the court granted *post*-petition discovery, not *pre*-petition discovery, so *Nicolaus* is inapposite. Further, he argues the requested discovery goes to exhausted claims, not unexhausted ones, so it is permissible notwithstanding *Nicolaus*.

In *Nicolaus* the Ninth Circuit held that discovery is not available in a habeas action under Habeas Rule 6 until the petitioner has filed a finalized petition. As one reason for its holding, the Ninth Circuit stated that any right to federal discovery "presupposes the presentation of an unexhausted [sic -- exhausted] federal claim." 98 F.3d at 1106. Thus, the court suggested that petitioner must exhaust the claim, and the discovery request, in state court before he will be granted discovery in federal court. The concurring Judge expressly agreed with this portion of the analysis. *Id.* at 1109 (Schroeder, J., concurring) ("Of course, Nicolaus must first exhaust his claim, along with available avenues for discovery, in state court.")

The outcome of respondent's motion thus appears to turn on whether the discovery the court granted relates to exhausted or unexhausted claims. It appears to the

court that the relevant discovery relates entirely to unexhausted claims. Such being the case, respondent's motion for reconsideration of the court's oral ruling on discovery will be granted, and no discovery will go forward. However, the court will hold a further hearing on this issue on May 2, 1997, at 10:30 a.m. If petitioner believes any of the pertinent discovery relates to exhausted claims, petitioner shall file a brief stating his objections to the court's tentative ruling at least ten days before the hearing.

ORDER

Accordingly, IT IS HEREBY ORDERED:

1. For the reasons stated above, the court concludes that the following claims are completely unexhausted: I, II, III, IV, V, VI, VII, VIII, IX.B, IX.C, IX.D, IX.E, IX.F, IX.G, IX.H, IX.I, XII.A, XII.C, XII.D, XIII, XV.A, XVI.A, XVI.B, XVI.E, XVIII, XIX and XX. The following claims are partially unexhausted: IX.J, IX.K, XII.B, XVI.C, XVI.F and XVI.L. The following claims are completely exhausted: IX.A, X, XI, XII.E, XIV, XV.B, XVI.D, XVI.G, XVI.H, XVI.I, XVI.J, XVI.K and XVII.

2. Respondent's motion for reconsideration is GRANTED in part and DENIED in part, as follows:

3. Respondent's renewed request to dismiss the petition due to the presence of unexhausted claims is DENIED.

4. Petitioner's request for permission to amend the petition to delete the unexhausted claims and allegations is GRANTED. If within 30 days of the date of this order petitioner has not resubmitted the petition with

the unexhausted claims and allegations stricken, the court will dismiss the petition.

5. If petitioner chooses to resubmit the petition with the unexhausted claims and allegations stricken, then:

a. Proceedings related to the federal petition, as amended by the elimination of the unexhausted claims and allegations, shall be STAYED until state exhaustion is completed.

b. Petitioner shall present all unexhausted claims to the California Supreme Court within 60 days of the date the amended petition is filed. Petitioner's counsel are expected to seek appointment by the California Supreme Court for all proceedings in that court.

c. Petitioner shall file a report with this court on the first day of every second month during the pendency of state proceedings setting forth whether such a petition is pending before the California Supreme Court and the status of any state proceedings. Petitioner shall file the first status report on July 1, 1997.

d. Upon filing of the amended petition, the stay of execution entered on June 30, 1995, shall be VACATED and a 60-day stay of execution entered within which petitioner may seek a further stay of execution from the California Supreme Court. *Cf.* L.R. 296-8(e).

e. Upon completion of state proceedings, petitioner shall file a second amended petition.

f. Respondent shall file an answer within 30 days of the filing of the second amended petition.

6. The motion to reconsider the oral ruling on discovery is tentatively GRANTED. The court will hold a hearing on *May 2, 1997, at 10:30 a.m.* to consider the motion further. If petitioner disagrees with the court's tentative conclusion that the relevant discovery relates solely to unexhausted claims, then at least *ten* days before the hearing petitioner shall file a brief stating his objections.

IT IS SO ORDERED.

DATED: April 1, 1997

/s/ MARILYN HALL PATEL
United States District Judge

FILED MARCH 6, 1998
CATHY A. CATTERSON, CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden,
Petitioner,

v.

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA,
Respondent,

FREDDIE LEE TAYLOR,
Real Party in Interest.

No. 97-70567
D.C. No. C 92-1627 MHP

ORDER

BEFORE: FARRIS, O'SCANNLAIN and HAWKINS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges O'Scannlain and Hawkins have voted to reject the suggestion for rehearing en banc, and Judge Farris has so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES CODE ANNOTATED
TITLE 28

28 U.S.C. § 2254(b) (1966) formerly provided:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

28 U.S.C. § 2254(b), as amended Apr. 24, 1996, Pub.L. 104-132, Title I, § 104, 110 Stat. 1218, now provides:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

UNITED STATES CODE ANNOTATED
TITLE 28

28 U.S.C. § 2244 (1966) formerly provided:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of

certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

28 U.S.C. § 2244, as amended Apr. 24, 1996, Pub.L. 104-132, Title I, §§ 101, 106, 110 Stat. 1217, 1220, now provides:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases

on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive

application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.